Supreme Court, U.S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

80-1057

No. 80-

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

Petitioners,

v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW Members of the Cook County Board of Appeals,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ILLINOIS

PETITION FOR CERTIORARI

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Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether a State may, by offering a remedy under 42 U.S.C. §1983 in State courts, avoid federal review of its taxes by reason of the Tax Injunction Act of 1937 (28 U.S.C. §1341), but at the same time decline to grant the full §1983 remedy required by the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988).

2. Whether State courts are obligated to entertain 42 U.S.C. §1983 actions.

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OPINIONS BELOW

The decision of the Supreme Court of Illinois, denying the appeal from the Appellate Court's refusal to award attorney's fees, is unreported. It appears only as a letter from the Clerk, and is reproduced as Appendix A.

The decision of the Illinois Appellate Court denying attorney's fees is also unreported. It is reproduced as Appendix B.

A prior decision in this case was reported as The 400 Condominium Association v. Tully, App., 35 Ill. Dec. 1, 79 Ill. App.3d 686, 398 N.E.2d 951 (Ill. App. 1979), leave to appeal denied (No. 53046, March 27, 1980). It is reproduced as Appendix C.

JURISDICTION

The decision of the Supreme Court of Illinois, denying the appeal from the Illinois Appellate Court, was entered September 29, 1980. This Court's jurisdiction is based on 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

> Amend. XIV, §1: "...nor shall any State...deny to any person... the equal protection of the laws."

Federal Statutes:

> 42 U.S.C. §1983. Civil action for deprivation of rights. "Every person who, under color of any statute, ordinance, regulation, or custom or usage, of any State... subjects, or causes to be subjected, any...person...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
>
> 42 U.S.C. §1988. Proceedings in vindication of civil rights. "... In any action or proceeding to enforce a provision of section[ ]... 1979 [i.e., 42 U.S.C. §1983] of the Revised Statutes, the Court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs."

Illinois Constitution:

> Art. I, §2: Due Process and Equal Protection. "No person shall be... denied the equal protection of the laws."

Illinois Statute:

> Illinois Revised Statutes (1975), Condominium Property Act, ch. 30, par. 310. Separate taxation. "Real property taxes...shall be assessed against and levied upon each unit and the owner's corresponding percentage of ownership in the common elements as a tract, and not upon the property as a whole."

STATEMENT OF THE CASE

The Condominium Property Act of Illinois,[1] as do similar Acts of almost all other States, provides that real property taxes on condominiums may only be assessed against the "units" and their corresponding percentage ownership of the "common elements."[2]

Petitioners (hereinafter "taxpayers") represent a large residential-commercial condominium in Chicago, Cook County, Illinois. For the tax year 1974, a portion of their

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[1] Ill. Rev. Stat. (1975), ch. 30, esp. par. 310.

[2] This provision is required in order to obtain FHA guaranteed mortgages. These mortgages were the key to the development of condominiums in the United States. Rohan & Reskin, Condominium Law & Practice, §2.03 at 2-9, and §7.05 at 7-42. See 12 U.S.C. §1715Y, and 24 C.F.R. §234.26(d)(3) (1962).

condominium common elements was separately assessed, and a separate real property tax was levied on that portion.

They brought an action against the County tax officials (respondents herein), in the Circuit Court of Cook County, Chancery Division. The complaint (App. D) asserted that the assessment and tax (1) contravened the Illinois Condominium Property Act, (2) violated the Illinois Constitution, and (3) violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

During discovery, it was established that the assessment of the condominium was unique. The Director of Appraisal stated that "it did not

any difference if no one else is treated in that way."

The Circuit Court preliminarily enjoined the assessment and tax, but then a different judge granted summary judgment for the County officials.

On appeal, the Appellate Court decided the controversy in the taxpayers' favor. The 400 Condominium Association v. Tully, App., 35 Ill.Dec. 1, 79 Ill.App.3d 686, 398 N.E.2d 951 (Ill.App. 1979). It held that the assessment and tax violated the Condominium Property Act, and that the tax was "unauthorized by law." It did not reach the State or the U.S. constitutional issues.

The County officials petitioned the Illinois Supreme Court for leave to

appeal. This was denied.

After remand to the Appellate Court, the taxpayers moved for award of recoverable costs, including a reasonable attorney's fee pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988[3]. They briefed their motion, pointing out that two Appellate Court decisions had held that actions under 42 U.S.C. §1983 could be brought in Illinois courts, and that the County officials were currently arguing to this Court that "the

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[3] As noted in Maher v. Gagne, at footnote 11, "the reference [in §1988] to actions 'to enforce' §1983 is somewhat imprecise in light of the fact that §1983 does not itself create substantive rights, [but] the legislative history makes it perfectly clear that the Act was intended to apply in any action for which §1983 provides a remedy." The settled rule is that a statute need not be recited in the complaint, Blue v. Craig, 505 F.2d 830, 844 (4th Cir. 1974), and cases cited.

availability of a §1983 action in Illinois courts bars district court jurisdiction under the Tax Injunction Act of 1937 (28 U.S.C. §1341)" (Brief for the Petitioners, in Rosewell v. LaSalle Nat'l. Bank, No. 79-1157).

The County officials opposed, arguing in part that "42 U.S.C. §1983 ...does not apply to tax cases."

On June 6, 1980, the Appellate Court denied the motion (App. B), in a one-sentence Order without opinion, stating only:

> "IT IS FURTHER ORDERED that the plaintiffs-appellants' motion to tax attorney's fees as costs...is denied."

On June 25, 1980, this Court decided Maine v. Thiboutot, ___U.S.___, 65 L.Ed.2d 555, and Maher v. Gagne, ___U.S.___, 65 L.Ed.2d 653.

Taxpayers immediately lodged a petition for rehearing with the Appellate Court, calling attention to the conflict with Maine and with Maher. Again the County officials opposed, arguing that "42 U.S.C. §1983 does not apply to tax cases." A motion for leave to file the petition was not acted upon by the Appellate Court.

Taxpayers then filed a timely appeal to the Illinois Supreme Court "as a matter of right [because] a question under the Constitution of the United States...arises for the first time in and as a result of the action of the Appellate Court" (Ill. Sup. Ct. Rule 317). They also petitioned, in the alternative, for a discretionary "leave to appeal" (Ill. Sup. Ct. Rule 315), on the basis that the Illinois

Supreme Court had yet to decide whether Illinois courts must entertain actions under 42 U.S.C. §1983.

On September 28, 1980, the Illinois Supreme Court denied the appeal (App. A), without comment. The Clerk wrote:

> "The Supreme Court today denied the petition for leave to appeal in the above entitled cause."

No reference was made to the appeal "as a matter of right."

REASONS FOR GRANTING THE WRIT

a. Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

This case presents the issue reserved in Martinez v. California, 444 U.S. 277, n.7 (1980) and in Maine v. Thiboutot, ___U.S.___, 65 L.Ed.2d 555, 558 n.1 (1980): whether State courts are obligated to entertain §1983 actions.

It arises in a particularly timely setting. Cook County tax officials are presently arguing before this Court that "the availability of a §1983 action in Illinois courts bars district court jurisdiction under the Tax Injunction Act of 1937 (28 U.S.C. §1341)" (Brief for the Petitioners, Question Presented, p.2, in Rosewell v. LaSalle National Bank, No. 79-1157).

They have now, in the present case, argued successfully to the Illinois courts that "42 U.S.C. §1983 does not apply to tax cases [in State courts]" --and the Illinois Supreme Court has essentially agreed.

The Cook County officials, and, indeed, the Illinois Supreme Court by not committing itself, see no inconsistency in attempting to avoid federal jurisdiction over State tax matters by saying there is a §1983 remedy in State courts, and then, when attorney's fees under §1988 are sought against the officials, responding that "42 U.S.C. §1983...does not apply to tax cases."

What the Illinois Court has failed to recognize, or if recognizes has not been willing to accept, is that

it is thereby denying taxpayers any forum to secure federally-guaranteed rights. The "federalism concerns" anticipated by this Court in Maine, at footnote 12, if a State does not award federal fees, are magnified where the State can at the same time preclude federal review and federal fees in any forum.

b. Federal Question Decided in a Way in Conflict With Decisions of Other State Courts of Last Resort

With the exception of Tennessee[4]--and now Illinois--every State court that has considered the matter has permitted §1983 actions to be brought in State courts, and will apply the §1988 fee remedy. This Court,

[4] Chamberlain v. Brown, 442 S.W.2d 248 (Tenn. 1969), discussed in LaSalle National Bank v. Rosewell, 604 F.2d 530, 53_ (7th Cir. 1979).

in Maine, at footnote 11, cited decisions in Alaska, Colorado, Maine, Washington, and Wyoming. The Brief for the Petitioners in Rosewell added Arizona, California, Massachusetts, Michigan, New York, New Mexico, North Carolina, and Wisconsin.[5]

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[5] Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979); New Times, Inc. v. Arizona Bd. of Regents, 20 Ariz. App. 422, 513 P.2d 960 (Ariz. App. 1973); Brown v. Pitchess, 13 Cal.3d 518, 531 P.2d 772 (Cal. App. 1975); Martinez v. Calfornia, 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (1978), aff'd, 444 U.S. 277 (1980); Thorpe v. Durango School District, 591 P.2d 1329 (Colo. App. 1978), cert. granted by Colorado Sup. Ct. (1979); Thiboutot v. Maine, 405 A.2d 230 (Me. 1979), aff'd, ___ U.S. ___, 65 L.Ed.2d 555 (1980); Rzeznik v. Chief of Police, 373 N.E.2d 1128 (Mass. 1978); Dudley v. Bell, 50 Mich. App. 678, 213 N.W. 2d 805 (Mich. App. 1973); Ramirez v. County of Hudson, 169 N.J. Super. 455, 404 A.2d 1271 (N.J. Super. 1979); Gomez v. Board of Ed. of Dulce Ind. Sch. Dist. No. 21, 85 N.M. 708, 516 P.2d 679 (N.M. 1973); Holt v. Troy, 78 Misc.2d 9, 355 N.Y.S. 2d 94 (N.Y. Super. 1974); Young v. Toia, 66 A.D.2d 377, 413 N.Y.S.2d 530 (N.Y.S. 1979); Williams v. Green, 36 N.C. App. 80, 243 S.E.2d 156 (N.C. App. 1978); Lange

No reason is apparent why taxpayers in Tennessee and Illinois should be required to "bring their complaints concerning state actions to federal courts," Maine, footnote 12. Especially no basis is evident for Illinois' asserting the availability of a State court §1983 remedy to foreclose federal jurisdiction under the Tax Injunction Act, and, at the same time, denying the existence of a full--or any--§1983 remedy in a State court.

c. Conflict With Decision of this Court

The Illinois Supreme Court's unexplained refusal to grant the appeal

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(Footnote continued)

v. Nature Conservancy, Inc., 24 Wash. App. 416, 601 P.2d 963 (Wash. App. 1979); Terry v. Kolski, 78 Wisc.2d 693, 254 N.W. 2d 704 (Wisc. 1977); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978).

as a matter of right, when its own Rule 317 specifies a non-discretionary appeal where "a question under the Constitution of the United States... arises for the first time in and as a result of the action of the Appellate Court," can be explained only by conjecture.

Regretably, conflict with Maine v. Thiboutot cannot be excluded.

d. Conflict With Decision of a Federal Court of Appeals

The failure of the Illinois Supreme Court to vacate and remand the Appellate Court's unexplained denial of §1988 attorney's fees conflicts with the decision of at least one federal court of appeals.

In reversing a lower court's failure to award §1988 fees, the Fifth Circuit, in Bunn v. Central Realty of

Louisiana, 592 F.2d 891, 892 (5th Cir. 1979), pointedly stated:

> "Although the [lower] court is vested with discretion to determine an award of attorney's fees,...it does not have discretion to ignore an applicable statute in deciding whether the [fee should] be assessed."

CONCLUSION

Petitioners suggest that this petition be held in abeyance pending this Court's decision in Rosewell v. LaSalle National Bank, No. 79-1157. Should the decision in Rosewell rely on the availability of a §1983 remedy in Illinois courts, it would be appropriate to grant certiorari in this case, and summarily vacate and remand for reconsideration by the Illinois Supreme Court in light of Rosewell.

This Court should, in any event, grant the writ.

Respectfully submitted,

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APPENDICES

Decision of Illinois Supreme Court, September 29, 1980 (letter from Clerk) A

Order of Appellate Court of Illinois June 6, 1980 B-1, B-2

Decision of Appellate Court of Illinois, December 19, 1979 C-1-C-18

Complaint, Circuit Court of Cook County D-1--D-9

App. A

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 29, 1980

Mr. Gerald S. Rose
Attorney at Law
One IBM Plaza, Suite 4600
Chicago, IL. 60611

No. 53760 - The 400 Condominium Association et al. etc., petitioners, v. Thomas M. Tully, Cook County Assessor; et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

App. B-1
78-873

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE 400 CONDOMINIUM ASSOCIATION, et al.	)	
	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiffs-Appellants,	)	OF COOK COUNTY
	)	
	)	CHANCERY
v.	)	DIVISION
	)	
THOMAS M. TULLY, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	

ORDER

This matter having come to be heard upon the motion of the plaintiffs-appellants to tax certain costs against the defendants-appellees, the court being fully advised in the premises:

IT IS ORDERED that the clerk of this court tax as costs in favor of the plaintiffs-appellants the following:

(1) Docketing fee in this court . . . . . $ 25.00

(2) Reasonable costs of producing the excerpts from the record $368.55

IT IS FURTHER ORDERED that the plaintiffs-appellants' motion to tax attorney's fees as costs and the appearance fee in the Illinois Supreme Court is denied.

Dated at Chicago, Illinois this 6th day of June, 1980.

ENTER:

JOHN M. O'CONNOR, JR., Justice

DOM J. RIZZI, Justice

ALLEN HARTMAN, Justice

App. C-1
Third Division
December 19, 1979

78-873

THE 400 CONDOMINIUM ASSOCIATION and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust No. 17460,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiffs-Appellants,	)	
v.	)	
THOMAS M. TULLY, Cook County Assessor; STANLEY T. KUSPER, JR., Cook County Treasurer and SEYMOUR ZABAN and HARRY H. SEMROW, Members of the Cook County Board of Appeals,	)	HONORABLE JOHN F. HECHINGER,
Defendants-Appellees.	)	

Mr. JUSTICE RIZZI delivered the opinion of the court:

Plaintiffs 400 Condominium Association and American National Bank

& Trust Company brought this action against certain Cook County officials to enjoin the assessment and levy of a tax on a garage of certain condominium property. Plaintiffs contend that taxing the garage separately from the condominium units violates the Condominium Property Act. Ill. Rev. Stat. 1975, ch. 30, pars. 300 et seq. Motions for summary judgment were filed by plaintiffs and defendants. Summary judgment was entered in favor of defendants and plaintiffs' motion for summary judgment was denied. We reverse and enter judgment in favor of plaintiffs.

In August 1973, property located at 400 E. Randolph Street in Chicago was converted into a condominium and named the Outer Drive East

Condominium. Pursuant to the Act, the Declaration of Condominium Ownership, articles of incorporation, and by-laws, were recorded with the Cook County Recorder of Deeds. Under the Declaration, the Condominium consists of 955 units (938 residential and 17 commercial). Pursuant to the Declaration and the Act, each condominium unit owner owns a unit, together with "the percentage of ownership in the common elements appertaining to such unit as computed and set forth in the declaration***." Ill. Rev. Stat. 1975, ch. 30, par. 306. Both the Act and the Declaration define the terms unit and common elements. But the terms are defined more extensively in the Declaration which also designates the garage as a common element. The Declaration further provides that the

garage is to be leased to a third party, and the limited parking spaces are to be rented on the basis of a fee.

For the year 1973, a single real estate tax was assessed against the entire Condominium. It was paid by each of the 184 unit owners in proportion to his corresponding percentage of unit ownership and ownership of the common elements. For the tax year 1974, a real estate tax was assessed and levied against each unit; a separate real estate tax was assessed and levied against the garage. The bill for the units was in excess of $940,000. The separately assessed garage tax bill was $127,574.47. Testimony revealed that the Assessor's office had ordered that a separate parcel number be given to the garage

for the tax year 1974 because it generated revenues from the lease. For the tax year 1975, the tax bill for the garage was one dollar.

Plaintiffs brought this suit to enjoin taxing the garage separately from the condominium units. The court entered a preliminary injunction restraining defendants from extending, equalizing, collecting or attempting to collect any tax on the garage for the tax year 1974. Later, the court denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment.

Plaintiffs initially argue that the separate assessment of the garage violates the prohibition against separate taxation of units and common elements under §10 of the Act. Ill.

Rev. Stat. 1975, ch. 30, par. 310.

Section 10 provides:

> Real property taxes *** shall be assessed against and levied upon each unit and the owner's corresponding percentage of ownership in the common elements of the tract, and not upon the property as a whole. (Emphasis added.)

Unless otherwise provided, unit is defined under the Act as "a part of the property including one or more rooms, occupying one or more floors or a part or parts thereof, designed and intended for any type of independent use, and having lawful access to a public way." Ill. Rev. Stat. 1975, ch. 30, par. 302(d). The term common elements is defined as "all portions of the property except the units." Ill. Rev. Stat. 1975, ch. 30, par. 302(e).

Section 10 mandates a legislative determination to the tax indivi-

dual condominium unit rather than the entire real estate property. See Kane & Helms, 1970 U. Ill. L.F. at 170. Thus, the individual condominium owner is insulated from the liabilities of the other condominium owners. See McCaughan, "The Florida Condominium Act Applied," 17 U. Fla. L. Rev. 1, 12 (1964).[1]

By using the word "shall" under §10, the legislative clearly evidenced its intent that the tax must be imposed on the owner's unit and corresponding percentage of ownership of common elements. Although the word

[1] We note that in order to obtain Federal Housing Authority guaranteed mortgages, taxation of the individual unit is required. These FHA mortgages were the key to the development of condominiums in the United States. See Rohan & Reskin, 1 Condominium Law & Practice, §2.03 at 2-9 (1979).

"shall" is generally interpreted as a mandatory rather than a directory term, courts must still consider the nature and purpose of the statute involved when construing the word. Andrews v. Foxworthy, 71 Ill. 2d 13, 20-22, 373 N.E.2d 1332, 1334-1336, (1978). The nature and purpose of the Condominium Act demonstrate that shall is a mandatory term in this context. Since insulating the unit owners from the liabilities of each other is an integral purpose of creating condominiums, permitting separate taxation of the unit and the common elements would affect the owners' financial independence. This is because a failure by one owner to pay his common element assessment would force the others to pay it or have the common elements encumbered

with a tax lien. See Clark, "Condominium: A Reconciliation of Competing Interests," 18 Vand. L. Rev. 1773, 1784 (1965).

Defendants next argue that the garage comes within the statutory definition of a unit, and thus, is not a common element as designated in the Declaration. Defendants therefore contend that the garage should be taxed as a unit, especially since it generates revenues from the lease. Defendants' argument is untenable for several reasons. First, although the Declaration of Ownership cannot supercede the Act, it can, if the condominium owners agree, supplement the statute, including statutory definitions such as unit and common elements. Ill. Rev. Stat. 1975, ch. 30, par. 304(d). In the Declaration,

the definition of unit follows the language of the Act, but specifies in some detail what is included and excluded. Additionally, the Declaration itemizes certain common elements such as the "garage." Since the statutory definitions can be modified (Ill. Rev. Stat. 1975, ch. 30, pars. 304(d), 302) these definitions were legally effective when the Declaration was filed and accepted.[2]

[2]Effective January 1, 1978, §2 of the Act has been amended to add other definitions including "limited common elements." Those elements are "a portion of the common elements so designated in the declaration as being reserved for the use of certain unit or units to the exclusion of other units, including but not limited to...parking spaces or facilities." (Emphasis added.) Ill. Rev. Stat. 1979, ch. 30, par. 302 (s). In the instant case, the Declaration's designation of the garage as a "common element" controls since this amendment shall not "affect the validity of any provisions of any instrument recorded before the effective date here-

Defendants also argue that the legislature never intended an income-producing garage to be a common element. However, we find no legislative or legal support for this contention, and therefore, the argument is without merit. Moreover, under defendants' argument, a laundry with washers and dryers, or a meeting room which is rented out, would have to be included as a unit because they all produce income. It is apparent that, absent statutory language, mere production of income does not make a particular area a unit under the Act.

We also note that defendants

(Footnote continued)

of." Section 2 of the Amendatory Act of 1977 (P.A. 80-1102.) Here, the Declaration was recorded in 1973, prior to this amendment.

keep shifting positions on how the garage should be classified and taxed. For the tax year 1973, the garage was classified and taxed as a common element. The 184 unit owners paid their separate tax bills. For the tax year 1974, the garage was assessed a $127,000 tax as a unit. For the tax year 1975, the tax for the garage was $1.00. This may be significant because a substantial reduction in the tax bill is indicative of the validity of the prior tax year's assessment. Hoyne Savings & Loan Association v. Hare, 60 Ill. 2d 84, 90, 322 N.E.2d 833, 836 (1974).

Moreover, this shift in positions from tax year 1973 to tax year 1974 would violate other sections of the Act and impair the condominium

title of the 184 unit owners who bought before the 1974 tax year reclassification. Specifically, §8 of the Act prohibits partition of the common elements and §6 provides that the unit owner is entitled to his percentage of common elements as set forth in the declaration. (Ill. Rev. Stat. 1975, ch. 30, pars. 308, 306). Since the garage was set forth in the Declaration as a common element, allowing defendants' reclassification to stand would violate the prohibition against partition of common elements under §8. Furthermore, if defendants' argument is adopted, the titles of the 184 unit owners would be clouded because, contrary to §7 of the Act, these owners would not be able to convey or transfer their corresponding percentage

of ownership in the common elements. Ill. Rev. Stat. 1975, ch. 30, par. 307.

Plaintiffs contend that because the assessment of the tax was unauthorized by law the court had equity jurisdiction to enjoin the assessment of the tax. In Clarendon Associates v. Korzen, 56 Ill. 2d 101, 105, 306 N.E. 2d 299, 301 (1973), the court stated:

> In the field of taxation the general rule applies that equity will not assume jurisdiction to grant relief where an adequate remedy at law exists. *** This general rule has been held by this court to be subject to two exceptions. A taxpayer need not look to the remedy at law but may seek relief by way of injunction where the tax is unauthorized by law or where it is levied upon property exempt from taxation. These two situations constitute independent grounds for equitable relief and in such cases it is not necessary that the remedy at law in inadequate. *** In cases involving the two ex-

> ceptions the remedy provided by statute is not exclusive, but the two remedies, that is, the statutory remedy and the remedy of injunction, are cumulative and the taxpayer may elect to pursue either one. *** (Emphasis added.)

In the present case, the assessed tax on the garage was not authorized by law because §10 of the Act prohibits separate taxation of the unit and its common elements. Thus, the plaintiffs need not look to the remedy at law but may seek relief by way of injunction. See Clarendon Associates v. Korzen, 56 Ill. 2d at 105, 306 N.E.2d at 301; Owens-Ill. Glass Co. v. McKibbin, 385 Ill. 245, 254-258, 52 N.E.2d 177, 182-183 (1944).

Defendants argue that the plaintiffs may not obtain injunctive relief. Defendants insist that the

plaintiffs may only look to their remedy at law, i.e., paying the tax under protest and filing objections to the application for judgment. Defendants rely upon Inolex Corp. v. Rosewell, 72 Ill. 2d 198, 380 N.E.2d 775 (1978) and North Pier Terminal v. Tully, 62 Ill. 2d 540, 343 N.E.2d 507 (1976). Those cases are inapposite because in the present case we are dealing with a tax that is unauthorized by law. The distinction and the different relief available are readily apparent by what the court said in Inolex, 72 Ill. 2d at 201, 202, 343 N.E.2d at 776, 777:

> The rule here applicable is that the collection of taxes will be enjoined only where the tax is either unauthorized by law or levied upon exempt property. *** We have considered the authorities cited by plaintiff and find apposite here the following language from North Pier

Terminal:

"We emphasize, however, that we are discussing only the power of the assessor to function. We are not deciding the validity of the tax as levied on the assessments in question. The defects of which the plaintiffs complain are essentially procedural irregularities in the assessment process which, while they may have a bearing on the question of the validity of the taxes levied, do not establish the lack of authority of the assessor to act. Thus, as noted in the cases cited below, the taxes are not 'unauthorized by law.'

This court has long held that if 'officers authorized to make the assessment make it, then mere irregularities in the proceedings under which it was made cannot give a court of chancery jurisdiction to restrain its collection.' ***

We conclude that the taxes involved in this case are not 'unauthorized by law' and that a basis for equitable relief as defined in Clarendon is not present. Plaintiffs

> had an adequate remedy at law by way of paying the taxes under protest and filing objections to the application for judgment. The trial court therefore erred in granting equitable relief." ***. (Emphasis in original.)

Here, unlike Inolex and North Pier Terminal, the taxes involved are unauthorized by law and, therefore, a basis for equitable relief as defined in Clarendon is present.

Accordingly, the summary judgment is entered in favor of the plaintiffs. The defendants are hereby permanently enjoined from assessing, levying or collecting the said unauthorized tax on the garage for the tax year 1974.

REVERSED.

O'CONNOR and HARTMAN, JJ., concur.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
CHANCERY DIVISION

THE 400 CONDOMINIUM ASSOCIATION, et al.	)	
	)	No. 75CH4625
Plaintiffs,	)	
v.	)	IN CHANCERY
THOMAS M. TULLY, Cook County Assessor, et al.	)	
Defendants.	)	

COMPLAINT IN CHANCERY FOR
INJUNCTIVE RELIEF AND ETC.

* * *

7. The subject matter of the within Complaint is the Outer Drive East Condominium, (herein referred to as the "Condominium"), which is certain improved real estate located in the County

of Cook, State of Illinois, at 400 East Randolph Street, Chicago 60601, Illinois.

* * *

9. The said improved real estate was submitted to the Condominium Property Act on or about August 24, 1973, and the "Declaration of Condominium Ownership" of the Condominium, the "Articles of Incorporation" of the Association, and the "By-Laws of The 400 Condominium Association were recorded by the Recorder of Deeds of Cook County as Jacket File No. 22,453,315.

* * *

11. Pursuant to said Declaration of Condominium Ownership each "Unit Owner," as defined in the said Declaration and in the Condominium Property Act, acquires ownership of a "Unit,"

also defined in said Declaration and in said Act, together with an undivided interest in the "Common Elements," also as defined in said Declaration and in said Act.

* * *

13. Pursuant to said Declaration, the "Common Elements" of said Condominium are defined as including the garage....which garage is located within the Condominium....

* * *

16. For the tax year 1974 separate real estate taxes were assessed against and levied upon (a) each residential unit, (b) each commercial unit, and (c) the garage....

17. The substantially uniform practice of the Assessor is to assess residential condominium units as a

fraction of the full fair market value of each unit and the unit owner's corresponding percentage of ownership in the common elements and not to assess the common elements or any part thereof as a separate tract.

18. The substantially uniform practice of the Assessor is to assess commercial real estate at a higher fraction of its full fair market value.

19. The Assessor departed from his substantially uniform practices as set forth in Paragraphs 17 and 18 above, and in assessing the subject real estate:

(a) excluded the garage from the Common Elements, and instead separately assessed the garage as a whole.

(b) assessed the garage at a valuation substantially in excess of the fraction of its full fair market value applicable to commercial real estate, and

(c) may have assessed the garage twice, namely both as part of the Common Elements and as a separate tract.

25. The taxes separately assessed against and levied upon the subject garage create a tax lien on part of the Common Elements (ch. 120, §697, Ill. Rev. Stat.), thereby clouding the title to each Unit, and diminishing the value and interfering with the sale thereof.

* * *

27. Unless this Court grants immediate and permanent relief in the premises the Plaintiffs will suffer irreparable injury. The taxes separately assessed against and levied upon the garage rather than on each Unit Owner's corresponding percentage of ownership in the garage as part of the Common Elements:

(a) are likely to jeopardize any Unit Owner's, or any future Unit Owner's, access to mortgage insurance under the National Housing Act (see paragraph 23 hereof).

(b) are likely to jeopardize the security interests upon which mortgagees have relied in accepting mortgages on Units

in the Condominium (see paragraph 24 hereof).

(c) are likely to jeopardize the marketability of title to Units in the Condominium (see paragraph 25 hereof, and Exhibit B).

(d) are likely to jeopardize the status of the Condominium under the Condominium Property Act (see paragraph 26 hereof).

* * *

WHEREFORE, Plaintiffs pray entry of decree and judgment:

(a) That the assessment of the subject garage, to wit: Vol. 510, Permanent Index No. 17-10-400-011-0000, for the year 1974, is void, illegal, invalid, and unenforceable,

(1) as being contrary to, and in excess of, the jurisdiction of the Assessor, in violation of Section 10 of the Condominium Property Act

(2) as being contrary to, and in excess of, the jurisdiction of the Assessor, in violation of Section 8 of the Condominium Property Act

(3) as being invidiously discriminatory within the class of similar condominium property, in violation of the "equal protection" clause of

Article I, Section 2, and the "uniform within each class" clause of Article IX, Section 4(b), of the Constitution of the State of Illinois, and of the "equal protection" clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

* * *

/s/ Gerald Rose
Attorney for Plaintiffs

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AFFIDAVIT OF MAILING
AND OF SERVICE

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

GERALD ROSE, being first duly sworn, deposes and says that:

1. He is a member of the Bar of this Court,

2. He personally deposited the required number of copies in a U.S. mail box, in the IBM Building, Chicago, Illinois, on December 24, 1980, before 5:00 P.M., first class postage pre-paid, addressed to the Clerk of this Court,

3. He served three copies of the Petition on MICHAEL F. BACCASH, c/o State's Attorney of Cook County, 500 Richard J. Daley Center, Chicago, Illinois 60602, as per statute herein made and provided.

4. All parties required to be served have been served.

Gerald Rose

Gerald Rose

Subscribed and Sworn to before me this 24th day of DECEMBER, 1980.

Margaret J. Carturight

Notary Public

Office-Supreme Court
FILED
MAR 27 198
ALEXANDER L. STE
CLERK

No. 80-1057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

Petitioners,

v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW, Members of the Cook County Board of Appeals,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD M. DALEY,
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Attorney for Respondents.

JANE CLARK CASEY,
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Assistant State's Attorney,
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Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED FOR REVIEW

1. Whether attorney's fees may be awarded pursuant to 42 U.S.C. §1988 when the underlying case was not filed pursuant to the Civil Rights Act and, in affording relief in the underlying case, no federally protected right was enforced, plaintiff having failed to allege the violation of a substantial federally protected right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

Petitioners,

v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW, Members of the Cook County Board of Appeals,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's recitation of the case is substantially correct with the following additions: Petitioner, in bringing its underlying case did not argue any substantial federal issue, although plaintiff did attempt to plead and brief an alleged equal protection violation. Rather, the state appellate court permitted an injunction against the tax because it did not comply with the Illinois Condominium Act. The court held that the tax should not have been assessed against the garage as one taxable unit, but should have been assessed pro rata against each unit owner. Even if the tax had been sustained there would not have been a double taxation problem.

REASON FOR DENYING WRIT

ATTORNEY'S FEES UNDER 42 U.S.C. §1988 WERE PROPERLY DENIED BECAUSE THE UNDERLYING CASE WAS NOT FILED PURSUANT TO THE CIVIL RIGHTS ACT, AND NO SUBSTANTIAL FEDERALLY PROTECTED RIGHT WAS INVOKED OR ENFORCED.

It is unequivocally clear that Illinois courts will hear federal civil rights cases brought, in particular, pursuant to 42 U.S.C. §1983. *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110, 113-114 (1st Dist. 1974); *Bohacs v. Reid*, 63 Ill. App. 3d 477, 481-82, 379 N.E.2d 1372, 1375 (2nd Dist. 1978). In fact, the Illinois Appellate Court in *Alberty* expressly rejected *Chamberlain v. Brown*, 442 S.W. 2d 248 (Tenn. 1969) the only case, so far as we can find, which has refused to acknowledge concurrent state court jurisdiction of actions premised on the Civil Rights Act.

In the case at bar, however, petitioner did not bring its case pursuant to 42 U.S.C. §1983. *The 400 Condominium Association v. Tully*, 79 Ill. App. 3d 686, 398 N.E.2d 951 (1st Dist. 1979). Petitioner proceeded under state law. Although petitioner made certain allegations of fact in its Complaint attempting to show an alleged equal protection violation, those allegations (Pet. App. D-6 and D-7) did not include federally protected rights. Moreover, plaintiff's allegation of a possible double tax (Pet. App. D-5) was not adopted by the Illinois Appellate Court in light of an uncontradicted affidavit in the record specifically denying the charge. Accordingly, since petitioner failed to allege a substantial federally protected right, failed to proceed under the Civil Rights Act, and since the Illinois Appellate Court did not

enforce a federally protected right, attorney's fees under the Civil Rights Act were properly denied.

Petitioner's "issue" presented at p. 19 of its Petition is not an issue at all in this case. As we have noted, Illinois courts hear Civil Rights cases. Further, petitioner's Petition creates the misleading impression that respondents have taken a position contrary to this well-settled Illinois law. (Pet. pp. 19-26) Petitioner cites our argument below that "42 U.S.C. §1983 . . . does apply to tax cases." However, petitioner omits the two cases which were cited to support the assertion: "See *Lynch v. Household Finance Corp.*, 92 S.Ct. 1113 at 1117 (Fn. 6), and *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 at 1277 (N.D. Ill. 1977)." It is therefore clear that we have consistently maintained that if civil rights jurisdiction does apply to tax cases, then Illinois courts will hear them under *Alberty* and *Bohacs*. See our arguments briefed in *Rosewell v. LaSalle National Bank, Trustee*, U.S. Supreme Court No. 79-1157 (March 24, 1981). Clearly, *Maine v. Thiboutot*, ... U.S. ....., 100 S.Ct. 2502 (1980), has no application to the case at bar.

CONCLUSION

Accordingly, we conclude that attorney's fees under 42 U.S.C. §1988 were properly denied because the underlying case was not filed pursuant to the Civil Rights Act, and no substantial federally protected right was invoked or enforced. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MICHAEL F. BACCASH,
Assistant State's Attorney,
Of Counsel.

March 26, 1981

No. 80-1057

APR 8 1981
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

Petitioners,

v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW Members of the Cook County Board of Appeals,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 80-1057

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

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v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW Members of the Cook County Board of Appeals,

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ON PETITION FOR WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

1. Whatever reasons the Appellate Court may have had for refusing to award attorneys fees, they certainly were not those now suggested by the respondents

("because the underlying case was not filed pursuant to the Civil Rights Act, and no substantial federally protected right was invoked or enforced" (Br. in Opp., p.3)):

--As the respondents elsewhere concede (Br. in Opp., p.2), taxpayers "did attempt to plead and brief an alleged equal protection violation." The Complaint did at least that: "invidiously discriminatory within the class of similar condominium property, in violation...of the 'equal protection' clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States" (Pet.Cert., App. D-8).

--most of the record in the trial court went to establishing the knowingly and intentionally unique tax assessment of the property.

> --in the original proceeding before the Appellate Court, much of the Brief and Argument for Plaintiffs-Appellants, was devoted to the unique assessment. One of the "Issues Presented for Review" was "whether the unique assessment...violates...the 'equal protection' clause[] of...the U.S. (Amend. XIV, Sect. 1) Constitution[]." Taxpayers expressly argued that this Court had "held in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 363 (1973), [that] the federal Equal Protection Clause is violated where there is a treatment which is 'invidious to a particular taxpayer'."

In other words, the federal Equal Protection issue was pleaded, proved, briefed, and

argued--and was left undecided by the Appellate Court (Pet.Cert., App. C).

2. Respondents would apparently be satisfied had the Complaint recited "42 U.S.C. §1983" (Br. in Opp., p. 3). Not only is it unnecessary under federal practice to plead a statute,* it is unnecessary under Illinois law.**

3. Respondents' contention (Br. in Opp., p. 4), that their statements to the Appellate Court ("42 U.S.C. §1983...does not apply to tax cases") are mitigated by

---

*Pet.Cert., p.15, n. 3, and cases cited.

**Bolton v. People, 95 Ill. App. 285, 287 (Ill.App. 1900) ("But the pleader here, as elsewhere in common law pleadings, is not bound to plead evidence or public statutes"); People ex rel. Krajci v. Kelly, 279 Ill.App. 22, 25 (Ill.App. 1935); Ohligschlager v. Proctor Community Hospital, 293 N.E.2d 86, 93, 6 Ill. App.3d 81 (Ill.App. 1972), rev'd on other grounds, 303 N.E.2d 392, 55 Ill.2d 411 (complaint may "contain sufficient facts from which it could clearly be established that the U.S. Code...[was] involved"); 30 Illinois Law & Practice (Pleading), §5, p.9.

accompanying citation to case authority, defies serious response.

4. In Rosewell v. LaSalle National Bank, ___U.S.___ (No. 79-1157, March 24, 1981), this Court subsumed, in the absence of any "question," "that under the Illinois procedure, the [Illinois] court will hear and decide any federal claim" (Slip Op., p.13). In the present case, "questions" have been raised--and the supposition is refuted. Both in the original decision concerning the Equal Protection issue (Pet.Cert., App. C)--where it made no difference in the outcome--and in the decisions now before this Court regarding §1983 and §1988 (id. at App. A, App. B)--where it did--the "state court[s] failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." Allen v. McCurry, ___U.S. ___, 49 U.S.L.W. 4015, 4018 (No. 79-935, 1980).

CONCLUSION

Federal rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Lawrence v. State Tax Commissioner, 286 U.S. 276, 282 (1932).

The issue is now squarely presented: are State courts obligated to entertain §1983 actions?

Respectfully submitted,

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AFFIDAVIT OF MAILING
AND OF SERVICE

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

GERALD ROSE, being first duly sworn, deposes and says that:

1. He is a member of the Bar of this Court,

2. He personally deposited the required number of copies in a U.S. mail box, in the IBM Building, Chicago, Illinois on April 7, 1981, before 5:00 P.M., first class postage prepaid, addressed to the Clerk of this Court,

3. He served three copies of the Reply on MICHAEL F. BACCASH, c/o State's Attorney of Cook County, 500 Richard J. Daley Center, Chicago, Illinois 60602, as per statute herein made and provided.

4. All parties required to be served have been served.

Gerald Rose

Subscribed and Sworn to before me this 7th day of April, 1981.

Margaret J Carturight
Notary Public

My commission expires
March 23, 1982